

Exhibit K

**STATE OF MINNESOTA
IN COURT OF APPEALS**

*In the Matter of the Denial of Contested
Case Hearing Requests and Issuance of
National Pollutant Discharge Elimination
System/State Disposal System Permit No.
MN0071013 for the Proposed NorthMet
Project St. Louis County Hoyt Lakes and
Babbitt Minnesota*

**DECLARATION OF
JEFF UDD**

Appellate Case Nos.
A19-0112
A19-0118
A19-0124

I, JEFF UDD, in accordance with section 358.116 of the Minnesota Statutes and rule 15 of the Minnesota Rules of General Practice, declare as follows:

Background

1. My job title is Manager of the Water and Mining Section for the Minnesota Pollution Control Agency (“MPCA”). I have been employed by MPCA since February 2002.
2. My job responsibilities have included oversight of developing and drafting National Pollutant Discharge Elimination System/State Disposal System Permit No. MN0071013 (“Water Permit”).
3. I was involved in oversight of the Water Permit from January 2018 until issuance on December 20, 2018. During this period I also participated in regular meetings and conference calls with EPA, including the April 5, 2018, telephone call with EPA referenced in WaterLegacy’s May 17, 2019, Motion for Transfer to the District Court or, in the Alternative, for Stay Due to Irregular Procedures and Missing Documents (“Motion”) and in its June 7, 2019, Reply in support of the Motion.

4. I submit this Declaration to the Court based on my personal knowledge and in support of MPCA's Sur-reply to WaterLegacy's Motion.

Responses to Questions Raised in WaterLegacy's Reply

5. WaterLegacy asks what actions MPCA took to affect "the decision of EPA Regional Administrator Stepp to prevent EPA Region 5 professional staff from sending the written comments they had prepared." WaterLegacy Reply, at 19 ¶ 1. First, I have no knowledge of whether Regional Administrator Stepp prevented professional staff from sending written comments. EPA has discretion whether or not to submit written comments, and I do not know why EPA did not submit any. I also have no knowledge of any communications between MPCA Commissioner John Linc Stine and EPA Administrator Cathy Stepp about alleged complaints with EPA's written comments.

6. Second, I did not participate, witness, or hear about any MPCA or EPA efforts to suppress the written comments prepared by EPA staff, nor did the lack of written comments concern or surprise me. As we processed written public comments from relators and others, we knew that we would be making changes to the draft version of the permit that was the subject of the April 5, 2018, conference call. As I understood it, rather than submitting comments on a draft of the permit that was going to be changed anyway, it would make more sense and be more efficient for EPA to comment on the post-comment version of the permit. It would have been inefficient for EPA to comment on a version of the draft Permit that we intended to change in response to written public comments, so it was not surprising to me that EPA did not submit its written comments on that version of the draft Poly Met Permit.

7. Jeffrey Fowley's declaration in support of WaterLegacy's Reply cites to my email in which I wrote, in reference to a phone conversation I had with EPA's Kevin Pierard, "[Kevin] would like to have [a phone call] the first week of April to walk through what the letter would have said if it were sent." *See id.* (Fowley Decl., Ex. 1). Mr. Fowley quotes this exchange apparently to show that MPCA was trying "to prevent EPA written comments from being sent at that time." *See id.* (Fowley Decl.), at 7. Mr. Fowley misinterprets the context of this exchange. The March 16, 2018, email is dated the day the public-comment period ended. Therefore, we knew that EPA had not submitted written comments during the public-comment period. The plan for EPA feedback is reflected in the email exchange: we knew that we were going to change the permit in response to written public comments, so rather than respond to duplicative comments that EPA would have sent on a version of the draft permit that we were going to change anyway, the more efficient process was for EPA to review the post-comment, pre-proposed draft, the version of the Poly Met Permit that had been changed to reflect our responses to public comments. We agreed to give EPA up to 60 days to respond to that revised draft. The April 5, 2018, call was therefore about the issues that EPA had previously raised with earlier drafts of the Poly Met Permit and, as I interpreted it, what EPA would be looking for in evaluating the adequacy of the pre-proposed draft.

8. The pre-proposed permit was sent to EPA on October 25, 2018. Mr. Pierard later called me during the review of the pre-proposed permit, and said that EPA did not need the whole 45 days to review it. They had evaluated it and asked that we send them the (nearly identical, except for corrections for typos) proposed permit, which triggered the

15-day review under the Memorandum of Agreement between MPCA and EPA. We sent the proposed permit to EPA on December 4, 2018. On or about December 18, 2018, Mr. Pierard said that EPA did not object to the permit, and MPCA could make its final determination on issuance of the permit. We issued it within days of EPA's report that EPA had no objections.

9. WaterLegacy asks whether the "purpose of these actions" was to "prevent the creation of a written record disclosing EPA's criticisms" on the Poly Met Permit. *See id.* ¶ 2. First, I have no knowledge of any "actions" anyone took to prevent EPA's criticisms from making it into the administrative record. To my knowledge, all notes MPCA staff took from the twice-monthly conference calls or meetings with EPA were included in the Data Practices Act ("DPA") releases and in the administrative record, so long as those notes were not privileged. All of the substantive notes of conversations with EPA that we relied on in developing the Poly Met Permit are included in the administrative record.

10. WaterLegacy asks about the contents of EPA's comments that it read to us over the phone on the April 5, 2018, conference call. *See id.* ¶ 3. The comments EPA read over the phone were duplicative of the feedback we had received from EPA throughout the permit-development period and are thus memorialized in the notes and other material included in the administrative record. EPA's comments were also duplicative of the written comments we received from the public during the public-comment period. We responded to these written comments in our responses to comments, so EPA's concerns, and our responses to them, are included in the administrative record.

11. On the call, it was clear that EPA was reading from a document, but we had no advance notice that this would be the nature of the call. I was surprised because all of our previous discussions were deliberative, and I expected that the call would consist of working through a handful of issues that EPA wanted us to focus on in responding to public comments. Here they just read comments to us, and there was little, if any, discussion. I was expecting a discussion. EPA staff read the comments very quickly, which accounts for why there were no substantive notes taken on this call, other than those taken by MPCA staff attorney Mike Schmidt.

12. WaterLegacy asks what happened to the notes taken at the April 5, 2018, conference call with EPA. *See id.* ¶ 4. I did not take notes during this call. It was my general practice not to take notes. No one ever directed or encouraged me, or (to my knowledge) any other MPCA staff member, to not take notes or to not retain notes that were taken.

13. WaterLegacy asks whether other notes of MPCA-EPA communications exist that were not retained. *See id.* ¶ 6. To my knowledge, all of the notes that were subject to release under the DPA or subject to inclusion in the administrative record have been treated accordingly. Furthermore, much of the substantive contents of the notes that MPCA included in the administrative record were worked into the final fact sheet and statement of basis, where MPCA explained the purpose and underlying substantive basis for the terms of the Poly Met Permit.

14. WaterLegacy asks whether MPCA staff was ever directed not to create or retain notes from its discussions with EPA. *See id.* at 20, ¶ 7. Again, I never took notes,

and I have never heard anyone discuss not taking or retaining notes of MPCA-EPA discussions.

15. WaterLegacy asks whether MPCA received from EPA at any time after November 3, 2016, any letters or emails memorializing conversations or meetings, or the resolution or failure to resolve points of concern. *See id.* ¶ 8. To my knowledge, we never received any letters or emails memorializing any discussions with EPA or the resolution—or lack thereof—of any criticisms EPA raised about the Poly Met Permit.

16. WaterLegacy asks whether MPCA ever received a letter from EPA stating that Poly Met's permit application had been cured of its deficiencies and was complete. *See id.* ¶ 9. I am not aware of any letters or emails from EPA memorializing anything substantive about the provisions of the Poly Met Permit application at any point in the permit-development process.

17. WaterLegacy asks whether MPCA discussed internally how to respond to EPA's April 5, 2018, oral comments. *See id.* ¶ 10. I never participated in any discussions about how to respond to EPA's oral comments. We did not think to attribute EPA's comments specifically, because they were not written comments. Having heard EPA's oral comments and read the public's written comments, I knew that EPA's comments overlapped with the public comments, so we knew that we had addressed them in our responses to comments. We knew that when we replied to the written public comments, we would have necessarily replied to EPA's comments.

I declare under penalty of perjury that everything I have stated in this document is true and correct.

Dated: June 12, 2019
Ramsey County
St. Paul, Minnesota



Jeff Udd
Manager, Water and Mining Section
Minnesota Pollution Control Agency

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